Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

SALLY CAMPBELL AND THE LOUISIANA CHRISTIAN COALITION,

Petitioners,

vs.

ST. TAMMANY PARISH SCHOOL BOARD, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a public school board violate the First and Fourteenth Amendments to the U.S. Constitution when that board denies a community group equal access to the use of its facilities during nonschool hours for the sole reason that the group's intended meeting, while otherwise permissible, is deemed to include "religious services or religious instruction"?

2. Is a policy governing use by community groups of public school facilities during nonschool hours unconstitutional, under the First and Fourteenth Amendments, when that policy allows "civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community," as well as "discussing religious material or material which contains a religious viewpoint" and "distributing such material," but forbids "religious services or religious instruction"?

3. Did the Fifth Circuit err in holding, in conflict with the First, Third, Fourth, Seventh, Eighth, and Tenth Circuits, that a public school board may deny equal access to the use of its facilities during nonschool hours solely on the basis of the religious content and viewpoint of the would-be user's speech, without violating the First and Fourteenth Amendments?

4. Did the Fifth Circuit err in holding, in conflict with the First, Third, and Fourth Circuits, that public school facilities that are available for use by the general public for "civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community" are not designated public fora for purposes of the right to free speech under the First and Fourteenth Amendments?

PARTIES

The caption of the case contains the names of all of the petitioners. Petitioner Louisiana Christian Coalition (LCC) is a corporation. LCC has no parent corporation. Nor does any publicly-held company own 10% or more of LCC's stock. *See* S. Ct. R. 29.6.

The respondents are the St. Tammany Parish School Board, School Board Superintendent Leonard P. Monteleone and School Board Administrative Supervisor William B. Brady, both sued in their official capacities, and the following school board members sued in their official capacities:

Eddie Fielding
A. R. Smith
Gregory J. Saurage
Donald J. Villere
Patti Young
Daniel G. Zechenelly
Betty Verzwyvelt
John C. Lamarque
E. Roth Allen
James Panks, Sr.
Anthony Tedesco
Ray A. Alfred
Mary K. Lynch
Charles T. Harrell
Neal M. Hennegan

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

In this case a school board discriminatorily denied Sally Campbell and the Louisiana Christian Coalition access to school facilities available for meetings of community groups. The sole reason for this discrimination was that the planned meeting would have included certain religious speech -- viz., prayers and songs of worship, and instruction on current issues from a Biblical perspective -- in addition to otherwise allowable discussion of current topics. This case therefore raises constitutional questions that overlap, to a large extent, the questions already pending before this Court in *Good News Club v. Milford Central School*, U.S. No. 99-2036 (to be argued Feb. 28, 2001). Consequently, this Court may wish to hold this case pending disposition of *Good News Club*. It should be noted, however, that the present petitioners also press arguments

independent of those on which petitioners rely in *Good News Club*. Hence, while a reversal in *Good News Club* would almost certainly warrant vacation of the judgment below and remand in the present case, the success of the present petitioners does not depend exclusively on a judgment of reversal in *Good News Club*. Furthermore, some of the arguments raised against petitioners in *Good News Club* do not apply to the present case, and to that extent the petitioners here have an even stronger claim to equal access.

DECISIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 206 F.3d 482 (5th Cir. 2000) (App. A). The Fifth Circuit's denial of rehearing and rehearing en banc. and the dissent therefrom, is reported at 231 F.3d 937 (5th Cir. 2000) (App. D). The opinion of the district court granting summary judgment is unreported. *See* App. B.

JURISDICTION

The U.S. Court of Appeals for the Fifth Circuit rendered its panel decision on March 9, 2000, and denied a timely petition for rehearing and rehearing en banc on October 26, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICIES

The text of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix E. The pertinent school district policy is set forth in Appendix F.

STATEMENT OF THE CASE

Facts

1. Use of Public School Facilities: Policy and Practice

On November 13, 1997, respondent St. Tammany Parish School Board, the governing body for public schools in that region of Louisiana,[1] adopted the following policy:

ST. TAMMANY PARISH SCHOOL BOARD
USE OF SCHOOL FACILITIES POLICY

Public school buildings and equipment are built and acquired by the expenditure of public funds for the primary use and benefit of the children of school age in St. Tammany Parish to include the recreation, physical training and athletics of all such children. While, from time to time, *the Board may permit the use of some of the public school buildings as a limited public forum*, the primary function and use of the buildings is first for the education of children, then *community, youth and adult group activities*, not the proprietary needs of any particular organization.

Public school buildings may also be used for holding civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community.

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[1]St. Tammany Parish is outside New Orleans. In Louisiana, counties are called "parishes." The school facilities at issue here are government facilities, not private religious schools.

Such uses shall be non-exclusive and open to the general public.

Additionally, public school buildings and equipment can be used for governmental and *non-partisan political functions*. Functions such as polling places or open candidate forums, civic forums and community centers for such purposes as evacuation or civil defense shall be allowed as permitted or mandated by law.

No outside organization or group may be allowed to conduct religious services or religious instruction on school premises. However, the use of school facilities by outside organizations or groups outside school hours for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible if it does not interfere with one of the primary uses of such facilities.

App. F (emphasis added). The policy governs some sixty different public school facilities. Pursuant to this policy, a huge variety of community uses are permissible -- indeed, all "uses pertaining to the welfare of the community." In practice, as superintendent Leonard P. Monteleone testified in his deposition, "our facilities are used quite extensively." Monteleone Dep. at 22. Indeed, approved uses numbered in the thousands. Exhibit 24, Exhibits in Support of Plaintiffs' Motion for Summary Judgment (hereafter "Plffs' Exhibits"). Among the plethora of authorized uses were the following:

- PRIDE - Rape Aggression Defense Program
- Brugier Homeowners Association - Candidates Forum
- Individual - Wedding Reception

- First Church of God in Christ - Banquet
- Kingsport Homeowners - Meeting
- Hartzell Mt. Zion United Methodist Church - Annual Tea
- Gold Wing Road Rider Association, Inc. - Benefit for K-8 Bar Ranch for Abused Children
- Chamber of Commerce - Internet Conference
- Relay for Life - Cancer Fundraiser
- Folsom Native Plant Society - Monthly Meetings
- North West St. Tammany Civic Association - Meetings
- Kiwanis Club of Slidell - Pancake Breakfast
- Pearl River Fire Department - Banquet
- Mary Thomas - Dance Recital and Rehearsal
- St. Tammany Commission on Families - Volunteer Opportunity Fair (for nonprofit organizations)
- Willow Wood Home Owners Association - Meetings (every other month)
- Environmental Protection Agency - Meeting
- Macedonia Baptist Church - Basketball (eleven dates)
- Dog Obedience Training
- PRIDE - "How to Talk So Kids Will Listen"
- Javier's Dance Studio - Recital Practice

Ex. 2, Plffs' Exhibits. In addition, school facilities are used extensively for community education programs and numerous athletic events. *Id.*

2. Religious Use/Restrictions

Both churches and secular organizations are eligible users of St. Tammany public school facilities. *See, e.g., id.* The St. Tammany access policy explicitly authorizes discussion and distribution of "religious material or material which contains a

religious viewpoint," App. F; hence, religion and religiously oriented materials are permissible subject matter. The St. Tammany policy, however, expressly forbids "religious services or religious instruction" by any "outside" organization or group. *Id.* When asked to distinguish between (forbidden) religious instruction and (permitted) discussion of religiously oriented material, neither the superintendent nor the administrative supervisor could do so. Monteleone Dep. at 43-44; Brady Dep. at 62-63. (These two officials exercise ultimate decision-making authority -- subject only to review by the school board -- regarding the interpretation and application of the St. Tammany use policy. Ex. 4, pp. 3-4, Plffs' Exhibits; Monteleone Dep. at 16; Fielding Dep. at 9-10.) Curiously, the school board does allow use of school facilities after hours for religious services and instruction, open to the public, when students or student groups submit the use request. Brady Dep. at 58-59, 64-65; Fielding Dep. at 10-16; Monteleone Dep. at 41, 92-93.

3. Denial of Petitioners' Request

On June 23, 1998, petitioner Sally Campbell, State Chairman of petitioner Louisiana Christian Coalition (LCC), wrote requesting the use of St. Tammany school facilities for an LCC meeting. Campbell wrote:

> The Louisiana Christian Coalition is planning a prayer meeting which would conceivably be held the evening of either Thursday August 6, 1998 or Thursday August 13, 1998, depending on the availability of your facilities. At our prayer meeting, we plan to worship the Lord in prayer and music. We also plan to discuss family and political issues, pray about those issues, and seek to engage in

> religious and Biblical instruction with regard to those issues. The entire meeting should not last more than one or two hours.
>
> This is not intended to be a fund raising event. The meeting will be open to all members of the community who wish to attend free of charge.

Ex. 10, Plffs' Exhibits. When she received no response, Campbell wrote again on July 14, 1998, reiterating that

> the requested prayer meeting would involve praise and worship music, prayer, and discussion of relevant and topical issues which will be addressed from a Biblical viewpoint.

Ex. 11, Plffs' Exhibits.

Respondent William B. Brady, Administrative Supervisor for the St. Tammany School Board, responded in a letter dated July 24, 1998. Brady wrote that the requested use was denied, citing the school board policy banning "religious services or instruction." Ex. 12, Plffs' Exhibits.[2] When a follow-up

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[2]The letter gave two additional reasons for denial which are not pertinent here. First, the letter claimed there were no "meeting facilities per se" at the particular school requested in Campbell's original letter. *Id.* Campbell thereafter wrote explaining that other area school facilities would be acceptable alternatives, and school officials subsequently admitted that the denial ultimately rested on the nature of the meeting, not the location. Brady Dep. at 50, 55; Monteleone Dep. at 84. Second, the letter cited a supposed ban on the use of school facilities "for the proprietary needs of any organization," Ex. 12, Plffs' Exhibits. However, school officials admitted in depositions that, in the context of Campbell's request, this supposed

(continued...)

request and a demand letter from her attorneys each proved fruitless, Campbell and the LCC filed suit.

Course of Proceedings

Petitioners Campbell and the LCC filed suit on September 2, 1998, in federal district court in Louisiana,[3] naming as defendants the St. Tammany Parish School Board, the members of that school board, the superintendent, and the administrative supervisor (all respondents here). Petitioners challenged the constitutionality of the St. Tammany use policy on its face and as applied. Petitioners contend that the discriminatory denial of equal access for petitioners' meeting, for the reason that the meeting was deemed to be "religious services or religious instruction," violated the federal constitutional guarantees of free speech, equal protection, free exercise of religion, and freedom of association, as well as the federal constitutional Establishment Clause.

The parties conducted discovery and then filed cross-motions for summary judgment.

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[2](...continued)
reason simply duplicated the ban on religious services and instruction, Monteleone Dep. at 82-83; Brady Dep. at 50-52; hence, this was not an independent grounds for denial of access. Nor is it apparent in what way the LCC's holding of a meeting could be any more "proprietary" than, for example, the many homeowners association meetings which St. Tammany allows.

[3]Petitioners invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343.

The district court held the St. Tammany policy unconstitutional on its face for vagueness. App. B. The court ruled that

> there is no intelligible way of determining when religious speech is permissible under the policy as "religious material or material which contains a religious viewpoint," or when it crosses some imaginary line and becomes prohibited "religious instruction."

App. 18a (quoting policy) (additional internal quotation marks and footnote omitted). The court noted further that "the term 'religious worship' is not defined" and that the superintendent himself admitted that he could not give a definition of "worship." App. 19a. The district court concluded that the challenged policy

> provides no guidance as to what constitutes prohibited religious service or religious instruction and what constitutes permissible discussion of religious material. As such, the policy fails to prohibit the "unbridled discretion" [of government officials deciding whether to allow speech, as] required by the Constitution.

App. 20a. Having held the policy facially unconstitutional on this basis, the district court did not address petitioners' "as applied" challenge or other grounds for a facial challenge. *Id.*

The St. Tammany Parish School Board and the other respondents appealed, and a three-judge panel of the Fifth Circuit reversed. App. A. Turning first to the vagueness argument, the court of appeals held that the policy was not unconstitutionally vague either facially or as applied. App. 4a-

7a. The court conceded that the policy suffered from "ambiguity at the margins -- for example, the line between [forbidden religious] instruction and [permitted religious] discussion may blur at the edges," App. 6a. Nevertheless, the court found that the terms "religious instruction" and "religious worship" had "a clear core meaning" and that confusion about the border between these forbidden types of expression and other allowable religious expression was "no more than the limits of language stretched by the active imagination of hypothesized application." App. 5a-6a. As applied, the policy was "not even arguably vague," the court of appeals declared: since the LCC meeting would have included "worship" in "prayer and music" as well as "religious and Biblical instruction," the policy prohibitions clearly applied. App. 5a.

Turning to petitioners' free speech arguments,[4] the court of appeals held that the St. Tammany policy passed First Amendment muster and that the respondent school board was therefore entitled to summary judgment. App. 7a-11a. In so doing, the court essentially adopted the view of the Second Circuit in *Bronx Household of Faith v. Community School District*, 127 F.3d 207 (2d Cir. 1997). *See* App. 9a-11a.[5]

The Fifth Circuit applied public forum analysis[6] to uphold the policy. As a threshold matter, the court of appeals acknowledged that the St. Tammany use policy "creates few limitations on use and skates close to establishing a designated

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[4]The court of appeals dismissed petitioners equal protection, free exercise, and establishment arguments in a terse footnote. App. 7a n.7.

[5]*See infra* note 14.

[6]*See infra* note 15.

public forum." App. 9a. Nevertheless, because the policy did not exclude *only* religious activities,[7] the court of appeals was "persuaded that the restrictions are minimally sufficient to maintain the school buildings' status as a non-public forum." App. 9a-10a.

Finally, the court of appeals held that the religious exclusions were not viewpoint-based but rather were constitutionally permissible "content-based discrimination" against the "substantive activity" of religion. App. 10a-11a.

Campbell and the LCC filed a petition for rehearing en banc. While the petition was pending, this Court granted certiorari in a Second Circuit equal access case. *See Good News Club v. Milford Central School*, 202 F.3d 502 (2d Cir.), *cert. granted*, 121 S. Ct. 296 (2000). The *Good News Club* decision, like the panel decision in the present case, relied primarily upon the Second Circuit's decision in *Bronx Household*. Petitioners Campbell and the LCC promptly alerted the Fifth Circuit to the grant of certiorari in *Good News Club*.

On October 26, 2000, the Fifth Circuit denied rehearing and, over a five-judge dissent, denied rehearing en banc. App. D.

The three-judge panel issued a *per curiam* opinion explaining its decision to deny rehearing. First, the panel insisted that St. Tammany had not created a public forum. App. 30a-35a. Second, the panel insisted that the use policy is not

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[7]The school board also construed the policy to forbid for-profit fundraising and partisan political activity. App. 9a.

viewpoint-discriminatory. App. 35a-38a. The panel conceded that the Establishment Clause does not require St. Tammany to deny equal access for religious activities, App. 36a, but nevertheless found the exclusion reasonable, *id.*, analogizing it to a flat ban on picketing, App. 36a-37a. Third, the panel speculated that St. Tammany's ban on religious instruction could be read to allow religious instruction when such instruction was not part of a religious service. App. 38a.[8]

Fourth and finally, the panel sought to distinguish the *Good News Club* case, in which this Court had granted certiorari. App. 39a-40a. Observing that the policy at issue in *Good News Club* banned use of school facilities "for religious purposes," the panel stated:

> There is a powerful argument that such a prohibition against the use of facilities for a religious *purpose* is facially invalid as inevitably presenting viewpoint discrimination.

App. 39a (emphasis in original). The panel claimed that barring a religious *service* was different. *Id.* Indeed, the panel opined that the same Good News Club that was excluded under the Second Circuit's ruling would be allowed in St. Tammany schools:

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[8]There is nothing in the record to support this interpretation of the St. Tammany policy. Moreover, the policy already bans religious services; hence, this novel reinterpretation of the policy would apparently render redundant and meaningless the separate ban on religious instruction. The panel claimed not to adopt this construction definitively, App. 38a, but the panel nevertheless proceeded to rely upon precisely this reinterpretation of the policy in distinguishing the *Good News Club* case, *see* App. 39a.

> To illustrate our point, as we have read the St. Tammany Parish rule, encouraging children to memorize Bible verses with opening and concluding prayer may be a religious activity, but it would not be prohibited as a religious service.

Id.[9]

Judge Edith Jones, joined by Judges Smith, Barksdale, Emilio Garza, and DeMoss, dissented from the denial of rehearing en banc. Judge Jones wrote for the dissenters:

> In upholding this blatant discrimination against religious speech a panel of our court seriously erred. . . . Its opinion conflicts with the Supreme Court's equal access and viewpoint discrimination cases, decisions of five other circuit courts, and previous Fifth Circuit cases.

App. 41a.

Judge Jones found fault with the panel's conclusion that only a nonpublic forum existed. By focusing on the few restrictions on access instead of the wide range of allowable uses, she wrote, "the panel is looking through the wrong end of the telescope." App. 43a. Judge Jones also noted that "the

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[9]There is nothing in the record to support the panel's speculation that praying with children and teaching them Bible verses for evangelical purposes would be allowed. Moreover, the panel did not explain why the possibility that the policy could be subject to such a dramatic substantive reinterpretation would not simply reinforce the district court's conclusion, in overturning the policy, that the policy was unconstitutionally vague and lent itself to unbridled discretion in administrative interpretation and application.

Supreme Court has strongly suggested" that a designated public forum is created by a policy and practice similar to those present here (citing *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 391 (1993)), and that most federal circuits had reached precisely that conclusion. App. 43a-44a.

> Were it otherwise, a public body could unilaterally narrow a designated public forum so as to exclude disfavored groups, cynically circumventing the Supreme Court's public forum jurisprudence. This court and others have thwarted such obvious machinations.

App. 45a.

Judge Jones concluded that the St. Tammany policy "created a limited public forum," App. 45a, and that the policy's "content-based exclusion of religious speakers" was "censorship pure and simple," App. 46a.

Judge Jones also faulted the panel for holding that the St. Tammany policy was "reasonable and viewpoint-neutral," *id.*

> The crux of the issue is this: when measured against the "welfare of the public standard," how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination? . . . To describe the exclusion as covering "religious activity" somehow outside the pale of the community's welfare makes no sense. Such a distinction not only invites active censorship by the St. Tammany School Board -- *e.g.*, does a prayer or Christian exhortation at the Fellowship of Christian Athletes meeting make it a religious worship service? -- but it flatly

> discriminates against those who practice, rather than simply profess or talk about, religion. Both of these effects have been condemned by the Supreme Court's equal access jurisprudence.
>
> . . . .
>
> To paraphrase one court, the panel opinion would allow atheists to put on a program denouncing religion or anti-Semites to sponsor a rant against Judaism, but it would not allow religious believers of any stripe to convene or instruct the faithful in this forum.

App. 48a, 50a.

Petitioners now seek certiorari in this Court.

REASONS FOR GRANTING THE WRIT

This case presents the constitutional question whether a governmental body may deny a community group equal access to the use of its facilities -- here, public school facilities during nonschool hours -- for the sole reason that the intended use, while otherwise permissible, may be characterized as including "religious services or religious instruction."

There is no question that the respondent school board has opened school facilities, pursuant to policy and practice, to use by private groups. Churches and religious organizations are admittedly eligible users. Religion is undeniably a permitted topic. *See* Policy (App. F) ("the use of school facilities by outside organizations or groups outside school hours for the purpose of discussing religious material or material which

contains a religious viewpoint or for distributing such material is permissible" if it does not interfere with one of the primary uses of such facilities). Permissible uses also undisputedly include all the secular components of religious worship and instruction, such as singing, dancing, meeting, holding a banquet, giving honor to someone or something, cultural exercises, sharing concerns, discussing literary works, and making presentations. Respondent school board only bars uses of this type which have a particular religious dimension, i.e., uses that, according to school officials, are characterized as "religious services or religious instruction."

Thus, for example, groups may use school facilities to study the Scriptures, but not if they do so from the perspective of believers. They may sing religious hymns for musical entertainment, but not for the worship of God. They may hold ceremonies to honor the Mayor, but not the Maker.

Such blatant anti-religious discrimination violates the U.S. Constitution in multiple respects. *Infra* § II. By upholding this flagrantly unconstitutional discrimination, the Fifth Circuit placed itself in conflict with many other federal circuits. *Infra* § I.

This Court should grant review.

I. THE DECISION OF THE FIFTH CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF OTHER CIRCUITS.

A. The Fifth Circuit's Decision Upholding the Discriminatory Exclusion of Private Religious Speech from Government Facilities Conflicts with the Decisions of the First, Third, Fourth, Seventh, Eighth, and Tenth Circuits.

The Fifth Circuit upheld in this case the discriminatory exclusion of religious worship and instruction *as such* from equal access to governmental facilities. This ruling conflicts with decisions of the First, Third, Fourth, Seventh, Eighth, and Tenth Circuits:

- **First Circuit**: School district may not deny equal access to school facilities for "direct advancement of religion." *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991) (Christmas dinner accompanied by evangelical message).

- **Third Circuit**: School district may not deny equal access to school facilities for religious services and distribution of literature. *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.) (magic show accompanied by evangelical message), *cert. denied*, 498 U.S. 899 (1990).

- **Fourth Circuit**: School board may not deny equal access to churches wishing to use school facilities for regular Sunday services. *Fairfax Covenant Church v. Fairfax County School Board*, 17 F.3d 703 (4th Cir.), *cert. denied*, 511 U.S. 1143 (1994) (holding unconstitutional, under

Free Speech and Free Exercise guarantees, policy imposing up to five times higher rental rate on plaintiff church).

- **Seventh Circuit**: Government may not deny equal access to its facilities, including school buildings, for religious uses. *See Grossbaum v. Indianapolis-Marion County Building Auth.*, 63 F.3d 581 (7th Cir. 1995) (invalidating exclusion of menorah from nonpublic forum lobby where other private displays were allowed); *Hedges v. Wauconda Community Unit School Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993) (overturning discriminatory ban on student distribution of religious literature);[10] *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996) (upholding neutral restrictions on student distribution of literature).[11]

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[10] *See id.* at 1297-98:

> [N]o arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time. . . . Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint. . . . Especially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection.

[11] *See id.* at 1543-44 (citations and editing marks omitted):

> [S]peech cannot be suppressed or discriminated against solely because it is religious. . . . Banning religious expression, which the Free Exercise Clause of the First Amendment singles out for protection, . . . solely because it is religious is per se unreasonable.

See also May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1113-14 (7th Cir. 1986) (arbitrary exclusion of private religious speech from public school facilities would be unconstitutional); *cf. Air Line Pilots Ass'n Int'l v. Department of Aviation*, 45 F.3d 1144 (7th Cir. 1995) (striking

(continued...)

- **Eighth Circuit**: School district may not deny equal access to its facilities to outside group wishing to engage in prayer, Bible reading, religious songs, and speeches. *Good News/Good Sports Club v. School Dist. of City of Ladue*, 28 F.3d 1501 (8th Cir. 1994) (religious youth club), *cert. denied*, 515 U.S. 1173 (1995). The court explicitly rejected the argument that religious speech is a separate excludible category. 28 F.3d at 1506-07 & n.8.

- **Tenth Circuit**: Policy denying equal access to government facilities for "sectarian instruction and worship" impermissibly restricts the viewpoint of would-be speakers. *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir.) (showing of religious film), *cert. denied*, 519 U.S. 949 (1996). The court explicitly rejected the argument that a ban on all sectarian instruction and religious worship was a viewpoint-neutral limit on subject matter. 84 F.3d at 1279.[12]

In addition, district courts in the Ninth and Eleventh Circuits have held unconstitutional the denial of equal access

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[11](...continued)
down exclusion of ad from nonpublic forum display diorama). As the Seventh Circuit explained in *Air Line Pilots*, in assessing whether viewpoint discrimination exists, the "inquiry cannot be evaded by retreat to the category of speech allegedly banned (here, 'political')." *Id.* at 1159. "Instead, the proper focus concerns whether or not the forum has included speech on the same general subject matter." *Id.* at 1160.

[12] *See also Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (school district may not deny church equal access to its facilities for worship or other religious purposes); *Shumway v. Albany County School Dist. No. One Board of Educ.*, 826 F. Supp. 1320 (D. Wyo. 1993) (school board may not deny equal access to its facilities for baccalaureate service).

to school facilities for religious services. *See Wallace v. Washoe County School Dist.*, 818 F. Supp. 1346 (D. Nev. 1991) (church's Sunday services); *Verbena United Methodist Church v. Chilton County Board of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991) (baccalaureate service).

Departing from this consistent line of authority,[13] the Fifth Circuit has aligned itself with the aberrant jurisprudence of the Second Circuit.[14] This Court should grant review to resolve this conflict.

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[13]The Fifth Circuit previously had followed the prevailing rule that the discriminatory exclusion of private religious speech from government facilities is unconstitutional. *See Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989).

[14]The Second Circuit is stubborn in its refusal to allow equal access for religious users. *See, e.g., Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980) (denying equal access to student Bible club), *cert. denied*, 454 U.S. 1123 (1981), *overruled, Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381 (2d Cir. 1992) (denying equal access to church wishing to show film with religious perspective), *rev'd*, 508 U.S. 384 (1993); *Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997) (denying equal access to church for worship services), *cert. denied*, 523 U.S. 1074 (1998); *Full Gospel Tabernacle v. Community School Dist. 27*, 164 F.3d 829 (2d Cir. 1999) (same), *cert. denied*, 527 U.S. 1036 (1999); *Good News Club v. Milford Central School*, 202 F.3d 502 (2d Cir.) (denying equal access to religiously oriented youth group), *cert. granted*, 121 S. Ct. 296 (2000).

B. The Decision of the Fifth Circuit that Public School Facilities which are Made Available to Outside Groups for "Civic and Recreational Meetings and Entertainment and Other Uses Pertaining to the Welfare of the Community" are not Designated Public Fora is in Conflict with the Decisions of the First, Third, and Fourth Circuits.

The Fifth Circuit held that the St. Tammany Parish school facilities are not public forum property for purposes of free speech, even though these facilities are available to community groups for, *inter alia*, "civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community." App. F. This holding is in square conflict with the decisions of at least three other federal circuits.

The federal courts of appeals for the First, Third, and Fourth Circuits have held that school facilities made available for civic and recreational use by outside groups are designated public fora subject to the strict standards governing traditional public fora.[15] *Grace Bible Fellowship, Inc. v. Maine School*

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[15]This Court regularly employs "forum" analysis in resolving claims of access to public property for purposes of free speech. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) ("we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or non-public"). There are "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802. Traditional public fora include property, such as public streets and parks, traditionally open to assembly and debate. *Id.* Designated public fora are facilities "not traditionally open to assembly and debate as a public forum" which government has "intentionally open[ed] . . . for public discourse." *Id.* Examples of designated public fora include university facilities made available for meetings of student groups, *Widmar*

(continued...)

Admin. Dist. #5, 941 F.2d 45 (1st Cir. 1991);[16] *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 498 U.S. 899 (1990);[17] *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc). District courts in at least three other federal circuits have held the same. *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745, 752 (M.D. Tenn. 1990) (school "ordinarily used for public events of all types"); *Wallace v. Washoe County School Dist.*, 701 F. Supp. 187, 189-90 (D. Nev. 1988) (policy allowed access for "public, literary, scientific, recreational or educational meetings, or for discussions of matters of general or public interest"); *Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F.

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[15](...continued)
v. Vincent, 454 U.S. 263 (1981), municipal theaters made available for private dramatic productions, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and school board meetings opened for citizen input, *Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). Nonpublic fora comprise property which is not by tradition or designation a forum for public communication, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), such as jailhouse grounds, *Adderley v. Florida*, 385 U.S. 39 (1966).

Content-based restrictions on speech in a traditional public forum trigger strict judicial scrutiny. *Perry*, 460 U.S. at 45. A restriction on speech in a "designated public forum, *whether of a limited or unlimited character* . . . is subject to the same limitations as that governing a traditional public forum." *ISKCON v. Lee*, 505 U.S. 672, 678 (1992) (emphasis added). *Accord Denver Area Educational Telecommunications Consortium, Inc.*, 518 U.S. 727, 794 (1996) (Kennedy, J., joined by Ginsburg, J., concurring and dissenting).

[16]"A policy, however well meant, to give access to whatever is good for the community . . . is not in any legal or practical sense limited," *id.* at 48.

[17]The policy in *Gregoire* allowed access to civic, cultural, and service organizations. 907 F.2d at 1372-73.

Supp. 1207 (D. Kan. 1983) (policy allowed access for activities serving "a community purpose," defined to include "educational, cultural, political, and recreational activities"). Petitioners are aware of no federal court outside of the Second and Fifth Circuits that has held to the contrary.

In conflict with these decisions, the Fifth Circuit held in the present case that the school facilities of St. Tammany Parish were not designated public fora subject to the strict standards governing public fora. App. 7a-10a. Instead, the court below held that St. Tammany had created a "nonpublic forum" for purposes of content-based exclusions from the use of school facilities. App. 10a. The court below reached this conclusion despite the explicit provision for civic, recreational, and entertainment uses by the community, and "other uses pertaining to the welfare of the community," in the official policy of the St. Tammany Parish School Board, App. F, despite the policy provision itself purporting to create a limited public forum, *id.*, and despite the consistent practice of St. Tammany allowing quite extensive use of its facilities by a wide diversity of outside groups, *see supra* pp. 4-5.

Public school facilities are not traditional public fora. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). But school facilities become *designated* public fora when "school authorities have 'by policy or practice' opened those facilities 'for *indiscriminate use by the general public*,' . . . or by some segment of the public, such as student organizations." *Id.* (emphasis added; citation omitted). School

authorities may not exclude otherwise eligible speakers[18] from designated public fora solely on the basis of the *content of their speech* unless the selective exclusion "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270 (citation omitted).

By disregarding this clear constitutional doctrine, the Fifth Circuit reached a decision that conflicts squarely with the decisions of at least three other circuits, as set forth above.

II. THE DECISION OF THE FIFTH CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF THIS COURT.

The Fifth Circuit has condoned the discriminatory exclusion of petitioners' intended activities because of the religious dimension of those activities. The incompatibility of this ruling with the precedents of this Court could scarcely be clearer. Indeed, the ruling below flies in the face of this Court's jurisprudence under at least four distinct constitutional provisions: free speech, free exercise, establishment, and equal protection.

A. The Free Speech Clause

Religious worship and instruction are constitutionally protected. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("religious worship and discussion . . . are forms of speech and association protected by the First Amendment") (and cases cited). "[P]rivate religious speech, far from being a First

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[18]Excluding all *non-student* groups from designated public forum school facilities, for example, would be permissible. *Widmar*, 454 U.S. at 267 n.5.

Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (and cases cited).

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be *Hamlet* without the prince. Accordingly, *we have not excluded from free-speech protections religious proselytizing . . . or even acts of worship.*

Id. (citations omitted) (emphasis added in part). The Free Speech Clause therefore precludes discrimination against religious speech, including worship and instruction. *Id.* at 761 (strict scrutiny applies where expression was rejected "precisely because its content was religious"). Indeed, such discrimination constitutes viewpoint discrimination. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993); *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995) ("discriminating against religious speech was discriminating on the basis of viewpoint"). Viewpoint-based discrimination -- an egregious form of content-based censorship, *Rosenberger*, 515 U.S. at 829 -- violates the right to free speech even in nonpublic fora. *See Lamb's Chapel*, 508 U.S. at 390-92; *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) ("government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). Hence, no forum analysis is necessary to invalidate such censorship. *Lamb's Chapel*, 508 U.S. at 391-92.

In the present case, petitioners Sally Campbell and the Louisiana Christian Coalition are eligible users of school facilities, religious matter is an eligible topic, and gathering to sing, speak, learn, and celebrate are eligible uses. Respondent school board nevertheless excluded the petitioners' expressive activities solely because the use would entail expressive activities with a forbidden perspective -- that of a believer offering worship to God. This is unconstitutional viewpoint discrimination, yet the Fifth Circuit upheld the exclusion.

B. The Free Exercise Clause

The Free Exercise Clause forbids the discriminatory restriction of religious activities. Such a restriction targets speech or conduct *because it is religious* and thus strikes at the very heart of the constitutional protection of religious freedom. *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status" or ban acts "only because of the religious belief that they display").

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.
>
> . . . .
>
> . . . There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of the law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on

> its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532-33 (1993). *See also McDaniel v. Paty*, 435 U.S. 618 (1978).

In the present case, the school board excludes "religious services" and "religious instruction" *because they are religious*. The component activities -- gathering, singing, speaking, teaching, celebrating, and so forth -- are not otherwise objectionable uses. Just as in *Lukumi*, the government could not constitutionally forbid only *religious* slaughter of animals, so here the school board cannot forbid only *religious* services and instruction. Yet the Fifth Circuit condoned the school board's targeted exclusion of religious ceremonies and instruction.

C. The Establishment Clause

The Establishment Clause requires neutrality and forbids hostility toward religion. As this Court has often explained, the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). *Accord Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (Establishment Clause forbids government action with an effect that "inhibits religion"). The discriminatory suppression of religious activities "would demonstrate not neutrality but hostility toward religion." *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990). *Accord McDaniel*, 435 U.S. at 641 (Brennan, J.,

concurring in judgment) ("The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion").

Moreover, discriminatory suppression of religious services and instruction requires the censor to make a judgment about what is and is not religious. This creates additional constitutional problems of "entanglement":

> [school officials] would need to determine which words and activities fall within "religious worship and religious teaching." The alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U.S. at 272 n.11 (internal quotation marks and citations omitted).

Thus, treating religious expression on equal terms with secular expression "would in fact *avoid* entanglement with religion," *Mergens*, 496 U.S. at 248 (emphasis in original; citation omitted).

In the present case, the school board denies equal access precisely for those activities which it deems to be religious services or instruction, regardless of whether the intended use would otherwise be permissible. Petitioners' request, for example, was -- in secular terms -- to hold a meeting for purposes of discussion and instruction regarding family and political issues. The school board denied access for this otherwise permissible use because the speech of participants

would include "prayer" and "worship" and because the instruction would be from a "Biblical viewpoint." *See* Exs. 10, 11, Plffs' Exhibits; Monteleone Dep. at 122-24. This is the antithesis of neutrality. Moreover, the policy at issue requires government officials to identify "religious services" and "religious instruction" by private groups in order to enforce the policy of exclusion. Government agents are thus compelled to classify the activities of private citizens according to their perceived religious purposes. Even if such a task were workable -- and it is not[19] -- it would be a wholly improper role for a government censor. *Widmar*, 454 U.S. at 269 n.6, 272 n.11.

Despite all these defects, the Fifth Circuit upheld the discriminatory exclusion at issue here.

D. The Equal Protection Clause

The Equal Protection Clause likewise forbids discrimination against the religious expression of private speakers. "At a minimum," governmental classifications "must be rationally related to a legitimate government purpose," while "classifications affecting fundamental rights . . . are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

A restriction on *religious* speech -- and *only religious* speech -- obviously represents a classification "affecting

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[19]The task of school officials is still more complicated in the present case. The school board's policy disallows "religious instruction" but permits "discussing religious material or material which contains a religious viewpoint." School officials admitted they could not tell the difference between these two categories. *Supra* p. 6.

fundamental rights," namely, the rights to free speech and free exercise of religion. Hence, strict scrutiny applies. There is no serious contention that some compelling need exists to exclude private religious speech from government facilities open to outside users; therefore, such restrictions are unconstitutional. Indeed, the arbitrary and selective prohibition of *religious* speech could only "rest on an irrational prejudice," *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985) -- namely, a bias against religion as such -- which would "fail rationally to justify singling out" religious speech for special restrictions, *cf. id. Accord Widmar*, 454 U.S. at 281 (Stevens, J., concurring in judgment) (perceiving no valid reason to exclude religious worship where comparable secular discussions are allowed). Yet the Fifth Circuit upheld the school board's arbitrary policy of exclusion of religious worship and instruction.

CONCLUSION

This Court should grant the petition for a writ of certiorari. In the alternative, this Court should hold this petition pending disposition of *Good News Club v. Milford Central School*, U.S. No. 99-2036, and then grant the present petition, vacate the decision below, and remand for further proceedings consistent with this Court's opinion in *Good News Club*.

Respectfully submitted,

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January 24, 2001

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-31071, Consolidated with No. 99-31140

SALLY CAMPBELL; LOUISIANA CHRISTIAN COALITION, Plaintiffs-Appellees,

versus

ST. TAMMANY'S SCHOOL BOARD; EDDIE FIELDING, in his official capacity as a member of the St. Tammany Parish School Board; A.R. SMITH, in his official capacity as a member of the St. Tammany Parish School Board; Also known as Smitty Smith; GREGORY J. SAURAGE, in his official capacity as a member of the St. Tammany Parish School Board; DONALD J. VILLERE, in his official capacity as a member of the St. Tammany Parish School Board; PATTI YOUNG, in her official capacity as a member of the St. Tammany Parish School Board; DANIEL G. ZECHENELLY, in his official capacity as a member of the St. Tammany Parish School Board; BETTY VERZWYVELT, in her official capacity as a member of the St. Tammany Parish School Board; JOHN C. LAMARQUE, in his official capacity as a member of the St. Tammany Parish School Board; E. ROTH ALLEN, in his official capacity as a member of the St. Tammany Parish School Board; JAMES PANKS, SR., in his official capacity as a member of the St. Tammany Parish School Board; also known as Ronnie Panks, Sr.; ANTHONY TEDESCO, also

known as Tony Todesco, in his official capacity as a member of the St. Tammany Parish School Board; RAY A. ALFRED, in his official capacity as a member of the St. Tammany Parish School Board; MARY K. LYNCH, in her official capacity as a member of the St. Tammany Parish School Board; CHARLES T. HARRELL, in his official capacity as a member of the St. Tammany Parish School Board; NEAL M. HENNEGAN, in his official capacity as a member of the St. Tammany Parish School Board; LEONARD P. MONTELEONE, in his official capacity as Superintendent of St. Tammany Parish School Board; WILLIAM B. BRADY, in his official capacity as Administrative Supervisor of St. Tammany Parish School Board,
Defendants-Appellants.

Decided March 9, 2000

Before POLITZ, JOHN R. GIBSON,* and HIGGINBOTHAM, Circuit Judges.

OPINION BY:
PATRICK E. HIGGINBOTHAM, Circuit Judge:

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*Circuit Judge of the Eighth Circuit, sitting by designation.

This is a First Amendment challenge to St. Tammany's School District's building use policy, which prohibits non-student uses involving religious worship or religious instruction. The District appeals the district court's judgment that the policy is unconstitutionally vague. Because we find that the terms "religious instruction" and "religious worship" used in the policy have understandable meaning and have not been inconsistently applied by the District, we REVERSE the grant of summary judgment for the plaintiffs, Sally Campbell and the Louisiana Christian Coalition. We also grant summary judgment to the District, holding that its use policy is viewpoint neutral consistent with the First Amendment.

I

St. Tammany's School District developed a written use policy for non-student groups who wish to use school facilities after hours. That policy permits buildings to be used for civic, recreational and entertainment purposes that are open to the public and pertain to the "welfare of the public." It does not permit partisan political activity or for-profit fund-raising. At issue in this case, the policy also forbids uses involving "religious services or religious instruction" but permits discussions of religious material or material containing a religious viewpoint.

In June 1998, Sally Campbell and the Louisiana Christian Coalition requested use of school facilities for a "prayer meeting" at which the group planned

> to worship the Lord in prayer and music . . . . to discuss family and political issues, pray about those issues, and

seek to engage in religious and Biblical instruction with regard to those issues.

The District denied the request, citing the policy, and this suit followed. The parties filed cross-motions for summary judgment. The district court granted summary judgment to Campbell, holding that the policy was facially vague. After an unsuccessful motion for new trial or motion for stay of judgment, the District timely appealed.

II

The district court held that the District's policy was unconstitutionally vague. The district court concluded that there was no intelligible way of determining when speech involving religious material or with a religious viewpoint, permitted by the policy, crossed over into religious instruction, forbidden by the policy. The court also noted that there was no definition of "religious worship" provided in the policy. We review these questions of law de novo.

A rule is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application."[1] For example, in Hall v. Board of School Commissioners, the court held that a school's rule regarding the distribution of political material was vague where approval turned solely on an administrator's unguided discretion.[2] Even

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[1]Connelly v. General Const. Co., 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926).

[2]681 F.2d 965, 967-68 (5th Cir. 1982).

if a rule is understandable, it also may fail vagueness analysis if it is inconsistently or arbitrarily applied.[3]

The policy here does feature specific prohibitions. Thus, unlike the disallowed policy in Hall, the District's policy does not consist of an administrator's whims. Campbell claims that the terms used, however, are so unclear as to be unconstitutionally vague. As applied to Campbell's request, which includes verbatim some of the prohibited terms, the policy is not even arguably vague. The group planned to "worship the Lord in prayer and music" and "engage in religious and Biblical instruction." There can be no doubt that these activities are included within the policy's disallowed uses.

Further, Campbell makes no showing that the District has arbitrarily applied the statute to her group. The accepted applications that had been made on behalf of religious groups were musical concerts or banquets, activities distinguishable from a prayer meeting. Having expressly requested a school building for uses disallowed by the policy, Campbell is hard-pressed to make an as-applied claim of unconstitutional vagueness.[4]

As a facial challenge, we fail to see how the terms "religious instruction" and "religious worship" would provoke

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[3]Dallas Assn. of Community Org.'s For Reform Now v. Dallas County Hosp. Dist., 670 F.2d 629, 633 (5th Cir. 1982).

[4]Campbell also cites various licensing cases describing procedural safeguards. She does not explain why those rules apply here, or what procedural injury she suffered; the request was handled in a timely way and involved review by higher-ups.

confusion amounting to unconstitutional vagueness. There is a clear core meaning. The terms have a common meaning such that people can use them without particular difficulty. While the language might be subject to ambiguity at the margins -- for example, the line between instruction and discussion may blur at the edges -- that effect is no more than the limits of language stretched by the active imagination of hypothesized application. To the point, we are not persuaded of uncertainty sufficiently chilling of speech to find the policy to be substantially overbroad.[5]

Campbell points to the deposed school administrators' desire to define the terms contextually as evidence that the terms are vague. A term may take meaning from its context, however, without being unconstitutionally vague. One court, in rejecting a claim of vagueness regarding the same terms, wrote:

> [T]he terms "religious services and religious instruction" have a common meaning such that people of ordinary intelligence -- perhaps after some thought -- can understand what conduct is prohibited. A performance of Handel's Messiah, for example, need not be a religious service. It depends upon the context and purpose for which it is performed.[6]

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[5]*See* Los Angeles Police Dept. v. United Reporting Publ'g Corp., 528 U.S. 32, 145 L. Ed. 2d 451, 120 S. Ct. 483, 489-90 (1999).

[6]Trinity United Methodist Parish v. Board of Educ., 907 F. Supp. 707, 718-19 (S.D.N.Y. 1995).

The testimony from school administrators in the record reflects such a common-sense, contextual understanding of "religious instruction" and "religious worship". School board member Edward Fielding stated that "religious worship" included a program that acknowledges God and involves religious activities such as song, prayer and Bible study. Superintendent Leonard Monteleone gave examples of "religious instruction" as including "interpretations of Bible readings" and "practices within a certain denominational faith." While the District's ability to describe the contested terms does not determine whether the policy is vague, it does illustrate that the terms have everyday, understandable meanings. We reject Campbell's claim that the policy is unconstitutionally vague.

III

Both parties argue that this court should grant summary judgment on First Amendment grounds,[7] an issue on which they had filed cross-motions for summary judgment in the district court.

The first question is where the District's policy falls in the Supreme Court's forum analysis. The right to speak on public property is largely dependent on the nature of the forum in which the speech is delivered. If the government has designated a forum as public, even if it was not traditionally public, the government's exclusion of a group from the forum

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[7]Campbell also makes a passing equal protection claim that is indistinguishable from her First Amendment claim. She further claims that the policy violates the Religion Clauses of the First Amendment but provides no evidence of how the policy hinders her free exercise or excessively entangles the District in religious affairs.

is subject to strict scrutiny. If the government has not so opened the forum, the government may exclude groups as long as that exclusion is reasonable and viewpoint neutral.[8]

To avoid strict scrutiny, the District's policy thus must not have created a public forum. Although a school is not a traditional public forum, a district may designate it as such by indiscriminately permitting use by the public at large for assembly and speech.[9] A school may selectively open itself to some public use, however, without creating a designated public forum.[10] In such cases, the government may restrict access to certain kinds of groups or to the discussion of certain topics.[11]

At some point, the allowance of a sufficiently wide variety of uses creates a designated public forum.[12] Before us is the question of where this line should be drawn. In cases where courts have held that schools had created a public forum, the school's access policy was completely open except for a

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[8]*See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S. Ct. 948, 954-55, 74 L. Ed. 2d 794 (1983).

[9]*See* Perry, 103 S. Ct. at 954.

[10]*See* id. at 956 (discussing use of school mailboxes by various organizations).

[11]*See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 115 S. Ct. 2510, 2516-17, 132 L. Ed. 2d 700 (1995). The Court has variously labeled such access a "non-public" or "limited public" forum. *See* Rosenberger, 115 S. Ct. at 2516; Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S. Ct. 2141, 2147, 124 L. Ed. 2d 352 (1993).

[12]*See* Lamb's Chapel, 113 S. Ct. at 2146 & n.5.

religious prohibition.[13] The Second Circuit held in Bronx Household v. Community School District that a policy forbidding meetings sponsored by political organizations, religious services and religious instruction did not create a designated public forum.[14]

The District's use policy, which excludes partisan political activity, for-profit fund-raising, and the religious activities at issue, creates few limitations on use and skates close to establishing a designated public forum. Unlike the policies held to have created a public forum through indiscriminate use, however, the District's policy prohibits several types of uses; the District's policy restricts more types of uses than the use policy held not to have created a public forum in Bronx Household.[15] The policy's restrictions indicate that the school's purposes in allowing some public use have not reached the

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[13]*See* Widmar v. Vincent, 454 U.S. 263, 265, 267, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981); Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5, 941 F.2d 45, 46-47 (1st Cir. 1991).

[14]127 F.3d 207, 210 (2d Cir. 1997). In Lamb's Chapel, the Supreme Court noted that there was a strong argument that the school district had created a public forum through its broad use policy, which was essentially identical to that in Bronx Household. In Lamb's Chapel, however, the Court found particularly relevant that the district had permitted a lecture by a New Age religious group. *See* Lamb's Chapel, 113 S. Ct. at 2143-44, 2146 n.5. The case was decided on other grounds.

[15]Concerned Women for America v. Lafayette County, 883 F.2d 32 (5th Cir. 1989), is not controlling here. First, the case decided only that the plaintiffs' showed a substantial likelihood of prevailing on their claim that a library had created a public forum. Concerned Women, 883 F.2d at 34. Second, the forum at issue was not a school, which is presumptively not a public forum unless the government designates it as such, but a public library.

point at which any use - save targeted religious activities - is allowed. We are thus persuaded that the restrictions are minimally sufficient to maintain the school buildings' status as a non-public forum.

Campbell contends that the District's policy does not pass muster even under the analysis applicable to non-public forums. If a school allows limited public access, the limits must reasonably relate to the purposes of the forum and may discriminate only on the basis of content, not viewpoint.[16] The government may not exclude a speaker with a religious viewpoint if it has permitted other speakers on similar topics.[17] Campbell claims both that the policy discriminates on viewpoint and that the District has already permitted other speakers on similar topics.

First, Campbell contends that the exclusion of religious services and religious instruction is viewpoint discrimination, not content discrimination. In Lamb's Chapel v. Center Moriches Union Free School District, the exclusion of a meeting on a subject permitted by a school district was unconstitutional because it was disallowed only because of the speaker's religious viewpoint.[18] This does not mean that any ban on religious activities amounts to viewpoint discrimination. Religion may be either a perspective on a topic such as marriage or may be a substantive activity in itself. In the latter

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[16]*See* Rosenberger, 115 S. Ct. at 2517.

[17]*See* Lamb's Chapel, 113 S. Ct. at 2147; Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1374-75 (3d Cir. 1990).

[18]Lamb's Chapel, 113 S. Ct. at 2147-48.

case, the government's exclusion of the activity is discrimination based on content, not viewpoint.

The Bronx Household court held that religious services and religious instruction are activities which may be excluded as content-based discrimination.[19] We agree with this approach, finding that religious services and instruction are not simply approaches to a topic, but activities whose primary purpose is to teach and experience the subject of religion. These are activities distinct from a topical discussion, a social gathering, or a political meeting.[20] The District has excluded such religious activities but does not forbid speakers on general topics with a religious perspective -- a distinction that viewpoint neutrality permits.

Finally, Campbell argues that the District has already opened the property for religious uses by permitting a church banquet and a gospel choir. While these groups may have had religious affiliations, the events involved no religious instruction and were not prayer meetings. We are not persuaded that the District has already permitted speakers on similar topics.

We hold that the District's use policy complies with the First Amendment as being neither unconstitutionally vague nor viewpoint discriminatory.

REVERSED.

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[19]Bronx Household, 127 F.3d at 215.

[20]*See* Rosenberger, 115 S. Ct. at 2517 (distinguishing religion as a subject matter from religion as a viewpoint).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SALLY CAMPBELL ET AL	*	CIVIL ACTION
VERSUS	*	NO. 98-2605
ST. TAMMANY PARISH SCHOOL BOARD ET AL	*	SECTION "G"

[Filed July 30, 1999; entered Aug. 2, 1999]

MEMORANDUM AND ORDER

On September 2, 1998, plaintiffs Sally Campbell and the Louisiana Christian Coalition, filed suit seeking a permanent injunction, declaratory judgment, and other relief asking the Court to declare the St. Tammany School Board's policy that prohibits religious services or instruction on school premises after school hours and on weekends to be unconstitutional. On May 18, 1999, both parties filed cross motions for summary judgment which are the subject of this order.

Background

On November 19, 1997 the St. Tammany Parish School Board adopted a policy that permits and encourages the use of school district facilities by members of the community ("the policy"). However, the policy excludes uses for "religious services or instruction on school premises." Specifically, the policy provides:

Public school buildings and equipment are built and acquired by the expenditure of public funds for the primary use and benefit of the children of school age in St. Tammany Parish to include the recreation, physical training and athletics of all such children. While, from time to time, the Board may permit the use of some of the public school buildings as a limited public forum, the primary function and use of the building is first for the education of children, then community, youth and adult group activities, not the proprietary needs of any particular organization.

Public school buildings may also be used for holding civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community. Such uses shall be non-exclusive and open to the general public.

Additionally, public school buildings and equipment can be used for governmental and non-partisan political functions. Functions such as polling places or open candidate forums, civic forums and community centers for such purposes as evacuation or civil defense shall be allowed as permitted or mandated by law.

No outside organization or group may be allowed to conduct religious services or religious instruction on school premises. However, the use of school facilities by outside organization or groups outside school hours for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such

material is permissible if it does not interfere with one of the primary uses of such facilities.

On July 14, 1998, Sally Campbell, State Chairman of the Christian Coalition, on behalf of the Christian Coalition, requested use of the Mandeville Elementary School premises to host a one time prayer meeting. Specifically, in her letter seeking approval for her request, Campbell stated:

> The Louisiana Christian Coalition is planning a prayer meeting which would conceivably be held the evening of either Thursday, August 6, 1998 or Thursday, August 13, 1998, depending on the availability of your facilities. At our prayer meeting, we plan to worship the Lord in prayer and music. We also plan to discuss family and political issues, pray about those issues, and seek to engage in religious and Biblical instruction with regard to those issues.[1]

On July 24, 1998, defendants denied this request through written correspondence citing the Policy restriction that "[n]o outside organization or group may be allowed to conduct religious services or religious instruction on school premises." Plaintiffs objected to this denial and reiterated their desire to use the School Board's facilities for their prayer meeting. This request was again denied.

On September 2, 1998, Plaintiffs filed this civil rights action seeking a permanent injunction, a declaratory judgment, monetary damages, and other relief, to redress past and

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[1]Letter of the Christian Coalition of Louisiana, dated June 23, 1998.

continuing deprivation by the defendants. Plaintiffs claim that defendants policy is unconstitutional because the policy (1) is unconstitutionally vague on its face; (2) violates plaintiffs' constitutional rights to freedom of speech; (3) violates plaintiffs constitutional rights to equal protection; (4) violates the establishment clause; (5) violates plaintiffs' right to free exercise of religion; and (6) violates plaintiffs' constitutional rights to freedom of association.

Standard of Review

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2] To meet this standard, the moving party must show that if the "evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof."[3] In other words, the court shall construe all facts and inferences in the light most favorable to the non-moving party.[4]

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[2]Fed. R. Civ. P. 56(c).

[3]Doddy v. Oxy USA, Inc., 101 F.3d 448, 461 (5th Cir. 1996), citing, Celotex v. Catrett, 477 U.S. 317, 327 (1986).

[4]LeJeune v. Shell Oil Co., 950 F.2d 267, 268 (5th Cir. 1992).

Discussion

A. Unconstitutionally Vague

If a policy, as written, does not furnish sufficient guidance to prohibit the unbridled discretion that is proscribed by the Constitution, then it is unconstitutionally vague.[5] A term so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[6] Where a policy "is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."[7]

As stated by the Supreme Court in *Grayned v. City of Rockford*:[8]

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.

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[5]Hall v. Board of School Commissioners of Mobile County, Alabama, 681 F.2d 965, (5th Cir. 1982).

[6]Connally v. General Const. Co., 269 U.S. 385, 391; 46 S. Ct. 126, 127 (1926).

[7]Smith v. Goguen, 415 U.S. 566, 573, 94 S. Ct. 1242, 1247 (1974).

[8]408 U.S. 104, 92 S. Ct. 2294 (1972).

> Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zones' . . . than if the boundaries of the forbidden areas were clearly marked.[9]

Although the Supreme Court in Grayned is addressing criminal statutes, these same principles apply to policies made by government officials, such as the one in this case.[10]

> Here, defendant's policy contains the following provision:
>
> No outside organization or group may be allowed to conduct *religious services or religious instruction* on school premises. However, the use of school facilities by outside organizations or groups outside school hours for the purpose of *discussing religious material or material*

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[9]*Id.* at 108-109, 2299. Footnotes omitted.

[10]*See* Hall v. Board of School Commissioners of Mobile County, Alabama, 681 F.2d 965, (5th Cir. 1982); Dallas Association of Community Organizations for Reform Now v. Dallas County Hospital District, 670 F.2d 629, (5th Cir. 1982).

> *which contains a religious viewpoint* or for distributing such material is permissible if it does not interfere with one of the primary uses of such facilities. [Emphasis added].

The policy contains no definition and no guidance as to what constitutes "religious service or religious instruction," nor does it contain a definition of "religious material or material which contains a religious viewpoint."

I agree with plaintiffs that "there is no intelligible way of determining when religious speech is permissible under the policy as 'religious material or material which contains a religious viewpoint', or when it crosses some imaginary line and becomes prohibited 'religious instruction.'"[11] I find that a person of ordinary intelligence would have to guess at what is permissible speech and what is prohibited speech.

Not only do I find that there is no distinction between religious instruction and discussion of religious material, but neither do the school officials interpreting the policy. When questioned about the difference, Leonard Montelone, the St. Tammany Parish School Board's Superintendent, stated in his deposition:

> Q. How does the purposes of discussing religious material differ from what would be considered religious instruction?
>
> A. I'm not sure that I know that. I think it would have to depend upon the specific request and what the intent was

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[11]Plaintiff's Memorandum in Support of Summary Judgment, p. 21.

of the individuals making the request or the organizations or what the case may be. *It is possibly the same.*[12]

When further questioned about the difference between "material which contains a religious viewpoint" and religious instruction, Montelone stated, "I don't know that it necessarily differs."[13] When asked this same question, William Brady, Administrative Supervisor for St. Tammany Parish School Board stated in his deposition, "I don't know what [the writers of this policy] meant."[14]

In addition, the term "religious worship" is not defined nor is their criteria to determine which requests constitute religious worship. Montelone state in his deposition, "I think worship means different things to different people . . . I can't put a definition to you for worship . . . [I]t's a call on my part, certainly."[15] Further, Brady stated in his deposition, "I don't think a prayer by itself makes a religious service. It could. In come people's opinion, it very may well *(sic)*. I don't know."[16]

Defendants argue that though the policy may be capable of differing interpretations, if the policy is applied in a

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[12]Deposition Transcript of Leonard Montelone, p. 43, lines 12-19. [Emphasis added].

[13]*Id.* at 44, lines 15-16.

[14]Deposition Transcript of William Brady, p. 63 line 5.

[15]Deposition Transcript of Leonard Montelone, p. 35, lines 7-8; and p. 36 lines 13, 14 & 19.

[16]Deposition Transcript of William Brady, p. 40 lines 13-15.

constitutional manner, the question of its alleged vagueness is irrelevant.[17] To support this assertion, defendants cite Hall v. Board of School Commissioners of Mobile County, Alabama.[18] Defendants reliance on this case is misplaced. Hall held that a school board's policies concerning literature distribution to faculty members was unconstitutional both *facially* and as applied since "they did not furnish sufficient guidance to prohibit the unbridled discretion that is proscribed by the Constitution."[19]

I find that St. Tammany's policy is similar to the one struck down in Hall in that this policy provides no guidance as to what constitutes prohibited religious service or religious instruction and what constitutes permissible discussion of religious material. As such, the policy fails to prohibit the "unbridled discretion" required by the Constitution. Because I find the policy facially invalid, it is not necessary for me to determine if the policy is applied in an unconstitutional manner. Additionally, it is not necessary for me to reach a decision as to the remaining grounds asserted by plaintiff.

Accordingly, IT IS ORDERED that plaintiffs' Motion for Summary Judgment is GRANTED and defendants' Motion for Summary Judgment is DENIED.

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[17]Consolidated Memorandum in Support of Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment, p. 40.

[18]681 F.2d 965, (5th Cir., 1982).

[19]681 F.2d at 969.

IT IS FURTHER ORDERED that defendants are ENJOINED from enforcing the policy.

/s/ Morey L. Sear
MOREY L. SEAR
U.S. DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SALLY CAMPBELL, ET AL.	*	CIVIL ACTION
VERSUS	*	NO. 98-2605
ST. TAMMANY PARISH SCHOOL BOARD, ET AL	*	SECTION: G(1)

[Filed Sept. 29, 1999; entered Sept. 30, 1999]

MEMORANDUM AND ORDER

Background

On September 2, 1998, Plaintiffs, Sally Campbell and the Louisiana Christian Coalition, commenced this action against Defendants, St. Tammany Parish School Board and its members and administrators, seeking declaratory and injunctive relief. Plaintiffs claimed that the St. Tammany Parish School Board Facility Use Policy is unconstitutional and that Defendants should be enjoined from enforcing the policy.

On May 18, 1999, the parties filed cross-motions for summary judgment. Following my review of the parties' voluminous submissions, I issued a Memorandum and Order on August 2, 1999. Therein, I determined that the St. Tammany Parish School Board Facility Use Policy is unconstitutionally vague and enjoined Defendants from enforcing the policy. I entered a judgment on that order on August 10, 1999.

On August 20, 1999, Defendants filed a Motion for New Trial and Alternative Motion for Stay of Judgment for Injunctive Relief. In support of their motion for new trial, Defendants asserted the same arguments submitted in their motion for summary judgment. In support of their motion for stay of the judgment for injunctive relief, Defendants claim that (1) they are likely to prevail on their appeal to the Fifth Circuit; (2) they will suffer irreparable injury from denial of the stay; (3) plaintiffs will not be substantially harmed by grant of the stay; and (4) granting the stay serves the public interest. In addition, Defendants filed a Motion for Interim Stay Pending Motion for New Trial, pursuant to Rule 62(b), on September 2, 1999, asserting the same arguments as those in their Rule 62(c) motion for stay.

Discussion

A. Motion for New Trial or to Amend or Alter Judgment

Under Rule 59 of the Federal Rules of Civil Procedure, a party may move for a new trial or to alter or amend a judgment, provided he files within 10 days of entry of the judgment. See Rule 59(b) & (e). Defendants timely filed their motion entitled Motion for New Trial. However, because the Defendants motion simply urges reconsideration of my judgment on the parties' cross-motions for summary judgment, Defendants' motion sets forth a motion to alter or amend judgment.

Rule 59 of the Federal Rules of Civil Procedures does not list specific grounds to alter or amend judgments. District courts, therefore, have considerable discretion in deciding whether to grant such a motion. See Wright, Miller & Kane,

Federal Practice and Procedure: Civil 2d §2810.1 (citing Edward H. Bohlin Co., Inc. v. Banning Co., Inc., 6 F.3d 350, 355 (5th Cir. 1993)). District courts may consider the following factors: (1) whether the judgment is based upon a manifest error of law or fact; (2) the existence of newly discovered or previously unavailable evidence; (3) whether reconsideration is necessary to prevent manifest injustice; or (4) an intervening change in controlling law. See id. However, reconsideration of a judgment is an extraordinary remedy which should be used sparingly. See id. Rule 59 motions may not be used to relitigate old matters, raise new arguments, or present evidence that could have been raised prior to entry of the judgment. Id.

Here, Defendants fail to demonstrate any of the conditions that justify relief under Rule 59(e). Defendants' arguments do not support any contention that (1) a manifest error of law or fact taints my judgment; (2) newly discovered or previously unavailable evidence exists; (3) reconsideration is necessary to avoid manifest injustice; or (4) an intervening change in controlling law occurred. Defendants merely recite the same arguments that they presented in their motion for summary judgment. Defendants must show more than mere disagreement with my decision to support a motion to amend or alter the judgment. Accordingly, Defendants motion for new trial or to amend or alter the judgment is denied.

B. Motion for Stay of Judgment for Injunctive Relief

Alternatively, Defendants move for a stay of the judgment for injunctive relief, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

Rule 62(c) provides in pertinent part that

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Although no specific standards for reviewing Rule 62(c) motions exist, the Fifth Circuit addressed the requirements for proper review of a motion for stay of a judgment for injunctive relief pursuant to Rule 8(a)(1)(C) of the Federal Rules of Appellate Procedure. In Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981), the Fifth Circuit considered the four factors:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

Although I am not required to address the four factors articulated in Ruiz, I have done so and deny Defendants' motion for stay of the judgment for injunctive relief. First, as

fully explained in my August 2, 1999 memorandum and order, Defendants' policy is unconstitutionally vague. Indeed, several of the defendants, including Superintendent Monteleone and Administrative Supervisor Brady, admitted that they did not understand the meaning of the policy or how to implement it consistently. Therefore, I find that Defendants are not likely to succeed on their appeal. Second, Defendants will not suffer irreparable injury if the stay is not granted. Defendants will suffer no harm from my order, requiring them to regulate the use of their facilities consistent with the Constitution and to treat Plaintiffs and other members of the community consistently. Third, granting Defendants' motion for stay would substantially harm Plaintiffs by allowing Defendants to continue to abridge Plaintiffs' constitutional rights by depriving them of access to a forum available to other members of the community. Finally, no public interest is served by allowing Defendants to continue to enforce an unconstitutional policy.

Accordingly,

IT IS ORDERED that Defendant's Motion for New Trial and Alternative Motion for Stay of Judgment for Injunctive Relief is DENIED. It is further ordered that Defendants' Motion for Interim Stay Pending Motion for New Trial is DENIED.

New Orleans, Louisiana, this 29th day of September, 1999.

/s/ Morey L. Sear
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-31071, Consolidated with No. 99-31140

SALLY CAMPBELL; LOUISIANA CHRISTIAN COALITION, Plaintiffs-Appellees,

versus

ST. TAMMANY'S SCHOOL BOARD; EDDIE FIELDING, in his official capacity as a member of the St. Tammany Parish School Board; A.R. SMITH, in his official capacity as a member of the St. Tammany Parish School Board; Also known as Smitty Smith; GREGORY J. SAURAGE, in his official capacity as a member of the St. Tammany Parish School Board; DONALD J. VILLERE, in his official capacity as a member of the St. Tammany Parish School Board; PATTI YOUNG, in her official capacity as a member of the St. Tammany Parish School Board; DANIEL G. ZECHENELLY, in his official capacity as a member of the St. Tammany Parish School Board; BETTY VERZWYVELT, in her official capacity as a member of the St. Tammany Parish School Board; JOHN C. LAMARQUE, in his official capacity as a member of the St. Tammany Parish School Board; E. ROTH ALLEN, in his official capacity as a member of the St. Tammany Parish School Board; JAMES PANKS, SR., in his official capacity as a member of the St. Tammany Parish School Board; also known as Ronnie Panks, Sr.; ANTHONY TEDESCO, also

known as Tony Todesco, in his official capacity as a member of the St. Tammany Parish School Board; RAY A. ALFRED, in his official capacity as a member of the St. Tammany Parish School Board; MARY K. LYNCH, in her official capacity as a member of the St. Tammany Parish School Board; CHARLES T. HARRELL, in his official capacity as a member of the St. Tammany Parish School Board; NEAL M. HENNEGAN, in his official capacity as a member of the St. Tammany Parish School Board; LEONARD P. MONTELEONE, in his official capacity as Superintendent of St. Tammany Parish School Board; WILLIAM B. BRADY, in his official capacity as Administrative Supervisor of St. Tammany Parish School Board,
Defendants-Appellants.

Decided October 26, 2000

ORDER ON PETITION FOR PANEL REHEARING

Before POLITZ, JOHN R. GIBSON,* and HIGGINBOTHAM, Circuit Judges.

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*Circuit Judge of the Eighth Circuit, sitting by designation.

PER CURIAM:

We held that the First Amendment does not force the St. Tammany Parish School Board to permit partisan political activity, for-profit fund-raising, and "religious services" in a limited public forum, reserved for recreational and civic activities. The entire court has refused to reconsider the panel's opinion. The panel has refused to reconsider for the reasons we will explain.

St. Tammany policy permits "the use of some of the public school buildings as a limited public forum."[1] The policy permits "civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community."[2] Basketball games, Scout meetings, and dance or music recitals were the overwhelming uses of the facilities disclosed by the record.[3] While the policy did not attempt to restrict First Amendment activity attendant to such civic or recreational uses,[4] it did exclude partisan political activity, for-profit

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[1]St. Tammany Parish School Board, Use of School Facilities Policy (Nov. 13, 1997).

[2]Id.

[3]There is a complete stipulation covering the use of school facilities under the rules at issue here suggesting in part that many groups like to play basketball.

[4]*Compare* Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 96 L. Ed. 2d 500, 107 S. Ct. 2568 (1987) (striking down a categorical ban on First Amendment activity in airports).

fund-raising, and "religious services or religious instruction."[5] Tracking the prohibitions of the rule, plaintiffs requested permission to use St. Tammany's facilities on a specific occasion "to worship the Lord in prayer and music" and to "pray about" and "engage in religious and Bible instruction with regard to" various issues.[6] The school district denied the request, and the plaintiffs filed suit. The district court granted summary judgment for the plaintiffs, persuaded that the rule was too vague. We reversed.

I

We remain convinced that St. Tammany has not created a public forum. The government, when it chooses to open a forum, necessarily has leeway to establish the terms upon which the forum is opened. Thus, for example, in Lehman v. City of Shaker Heights,[7] a city government had the prerogative to exclude political advertising, even though it generally allowed commercial advertising on city busses.[8] This even though political speech lies at the core of the First Amendment. St. Tammany has done no more than exercise that leeway. It does not censor First Amendment activity attendant to the civic or recreational use of school facilities. It merely forbids three activities, albeit expressive activities: partisan political activity, for-profit fund-raising, and religious services.

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[5]St. Tammany Parish School Board, Use of School Facilities Policy (Nov. 13, 1977).

[6]Campbell v. St. Tammany's Sch. Bd., 206 F.3d 482, 484 (5th Cir. 2000).

[7]418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974).

[8]418 U.S. at 300-02.

Since a middle school is not a traditional public forum,[9] the type of forum created by the St. Tammany policy is a function of the intent of the Board. As the Supreme Court held in Cornelius v. NAACP Legal Defense and Educational Fund,[10]

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.[11]

Here, the intent of St. Tammany is abundantly clear. The policy begins by indicating that it seeks to create "a limited public forum."[12] That intent, to limit use of the forum, is reinforced by the restrictions imposed in the policy: no partisan political activity, no for-profit fund-raising, and no religious services. These evenhanded exclusions, which the record shows to have been uniformly enforced, also rebut any inference that the

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[9]*See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988) ("The public schools do not possess all of the attributes of streets, parks, and other traditional public forums ....").

[10]473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

[11]473 U.S. at 802.

[12]St. Tammany Parish School Board, Use of School Facilities Policy (Nov. 13, 1997).

purpose statement is somehow pretextual, or made in bad faith. That St. Tammany does not censor speech incident to the civic and recreational uses for which the forum was opened, even specifically including religious viewpoints, "does not imply that the forum thereby becomes a public forum for First Amendment purposes."[13] It merely implies that St. Tammany assiduously avoided viewpoint discrimination, while still limiting the purposes for which it opened its schools.

St. Tammany has not permitted an indiscriminate range of uses. Express permission, almost always in writing, is required before using any of the school facilities. Many groups use the facilities, but for only a handful of purposes. Although "civic and recreational" uses might have a quite different meaning in San Francisco or Chicago, the local school board, familiar with St. Tammany Parish culture, knew what "civic and recreational" uses meant in St. Tammany. Their expectations regarding the activities they were permitting were not disappointed, and the uses made of school facilities in no way frustrated the board's explicit purpose of creating a limited public forum. For example, well over half of the uses reported in the record are affirmatively described as sports, dance or music recitals, or Scouting events.[14] The record affirmatively

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[13]473 U.S. at 805.

[14]While groups having a religious character often used the schools, the record reveals that those groups almost always played basketball: "Knights of Columbus: Hoop Shots"; "Starlight Baptist: Basketball Practice." The Fellowship of Christian Athletes apparently shares this proclivity for basketball. One request for use read: "We need a place to practice [basketball] because Slidell High's gym is being used for Fellowship of Christian Athletes." This is in fact the only mention in the record of use by

(continued...)

reflects that almost seventy-five percent of all uses were for activities directly related to students, including PTA meetings, standardized tests, and graduations. Although the record shows some that civic groups, such as the Chamber of Commerce or homeowners' associations, occasionally met in a school cafeteria, the record contains no evidence of the content of the programs, beyond occasional annotations referring to annual teas or banquets. Some plainly were relevant to students; a Lion's Club, for example, "adopted" a school. In sum, the record shows that St. Tammany schools were overwhelmingly used by groups for activity of interest to students or parents. Such a limited set of uses does not create a public forum, as the Supreme Court held in Perry Education Association v. Perry Local Educators' Association:

> We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum. . . . Moreover, even if we assume that by granting access to the Cub Scouts, YMCA's, and parochial schools, the School District has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a

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[14](...continued)
this group, despite Plaintiffs' efforts to highlight it.

> consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.[15]

On the record of this case St. Tammany has not created a public forum. It limited use at all times, and the uses it allowed are overwhelmingly typical interests and activities of students and parents - mostly recreation and sport.

St. Tammany is attempting to open its school facilities. A contrary holding would frustrate that objective and diminish, rather than increase, opportunities for freedom of speech. Under the Supreme Court's jurisprudence, a government entity such as a school board has the opportunity to open its facilities to activity protected by the First Amendment, without inviting political and religious activities presented in a form that would disserve its efforts to maintain neutrality. We are persuaded that the Constitution does not deprive local school boards of that choice, and courts stand ready to hear complaints of pretext or bad faith. Were we to hold otherwise, a school board would be put to a choice of maintaining a public forum or no forum at all. Just as church services could not be excluded from a public forum, neither could partisan political activities or for-profit fund-raising. There is no "in between" forum in which religious services must be allowed but partisan political activity can be banned. The concept of a limited public forum does not permit such preferences - a preference for religion that itself could be

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[15]Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47-48, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983) (emphasis added).

seen as viewpoint based.[16] Nor could St. Tammany allow civic and recreational uses, but categorically bar all attendant First Amendment activity.[17] Thus, if St. Tammany cannot define and limit the forum it creates, it may have no alternative but to close its doors to all after-hours activity.

II

We remain convinced that St. Tammany's policy is not viewpoint discriminatory. By its plain language, St. Tammany's policy permits the expression of religious viewpoints. Immediately after the provision challenged here, barring "religious services or religious instruction on school premises," the policy goes on to state: "However, the use of school facilities by outside organizations or groups outside school hours for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible if it does not interfere with one of the primary uses of such facilities."[18] The policy's express tolerance of discussion from a religious viewpoint rebuts any inference of viewpoint discrimination.

St. Tammany's policy is supported by rational reasons sufficient to rebut any inference that its decision to exclude religious services was viewpoint discriminatory. Especially

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[16]*See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 652-53, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981).

[17]*See* Jews for Jesus, 482 U.S. at 577.

[18]St. Tammany Parish School Board, Use of School Facilities Policy (Nov. 13, 1997) (emphasis added).

where, as here, the school district has affirmative evidence that its motive was not viewpoint discrimination,[19] such reasons need only be rational. They need not be compelling. St. Tammany has not singled out religious speech for unfavorable treatment. What St. Tammany has done is to prohibit three forms of potential activities that might erode the neutrality of the schools. St. Tammany bars partisan political activity, lest the schools be drawn into partisan frays or give an appearance of support for Democrats or Republicans. St. Tammany bars religious services, lest the schools appear to prefer Christians or Muslims, and religion over non-religion.[20] It does not matter that the Establishment Clause does not require St. Tammany to exclude religious services. The school board could rationally decide as it did in discharging the duty of evenhanded treatment. Nor does it matter that federal judges would cast a different vote were they members of the school board, or that political winds encourage such views - at least, it should not matter.

This distinction, between prohibiting religious services and prohibiting expression from a religious viewpoint, is no more conceptually difficult than the distinction between prohibiting picketing and prohibiting all picketing except that which bears

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[19]The provisions of St. Tammany's policy that expressly permit discussion of religious viewpoints provide affirmative evidence that the policy is not driven by viewpoint discrimination.

[20]This parallelism raises the question of how far the Plaintiffs would take their reasoning. Would not St. Tammany also be required to allow Democrats and Republicans to hold rallies on school campuses? *See* Heffron, 452 U.S. at 652-53.

on a labor dispute.[21] A religious service is an activity, a manner of communicating which carries a very special and distinct meaning in our culture. While a service may express a religious viewpoint, for example, a Catholic mass featuring a prayer for the welfare of the unborn and for the reform of American abortion law, the distinction is between medium and message.[22] Under St. Tammany's policy, thus, a Catholic group could assemble on school property to "discuss" a Christian anti-abortion viewpoint and "distribute . . . material" advocating a Christian anti-abortion viewpoint. They would only run afoul of the policy if they also chose to "conduct religious services."[23]

"[R]eligious organizations" do not "enjoy rights to communicate . . . superior to those of other organizations having social, political or ideological messages to

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[21]*See* Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-97, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972) (noting that the "operative distinction is the message on the picket sign," and explaining past jurisprudence as "condemn[ing] . . . discrimination among different users of the same medium of expression").

[22]Widmar v. Vincent, 454 U.S. 263, 269, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981), is not to the contrary. As the Supreme Court made clear in Cornelius, the University in Widmar had "evidenced a clear intent to create a public forum." 473 U.S. at 802. The error made by the University, which Widmar corrected, was the "erroneous conclusion that the Establishment Clause required the exclusion of groups meeting for religious purposes." 473 U.S. at 803. Here, by contrast, St. Tammany has evidenced, by its rules and by the manner of enforcement, a clear intent to create only a limited public forum.

[23]The churches of St. Tammany Parish have little or no interest in using a school facility for such purposes, as a scan of the uses made discloses.

proselytize."[24] In this case, St. Tammany decided that it did not wish to create a public forum. Rather, it preferred a policy of not restricting free expression attending the permitted uses of school facilities, while still avoiding forms of expressive activity that it believed eroded its goal of neutrality. No one in this case contends that St. Tammany is guilty of viewpoint discrimination because it bars partisan political activity. Insisting here that St. Tammany's ban on religious services is unconstitutional looks less like a reach for equal treatment, and more like a reach for an affirmative preference for religious speakers over political speakers.

III

In denying rehearing we note that in the present case, the Plaintiff specifically requested accommodations for a single program of religious worship and instruction. The carefully framed request for use did not propose to lecture or teach religion or religious tenets. The Coalition's request and the St. Tammany rules are fairly read to speak to worship services. St. Tammany policy follows its prohibition of religious instruction with an explicit statement that "discussing religious material or material which contains a religious viewpoint" is permitted. Read in context, the distinction between religious instruction as part of a religious service and instructing on the matter of religion is clear. St. Tammany's rules need not be read to prohibit the latter.[25] In any event, that question is not presented in this case.

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[24] Heffron, 452 U.S. at 652-53.

[25] *See* Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 217 (2d Cir. 1997) (Cabranes, J., concurring in part and dissenting in part).

IV

Plaintiffs draw to our attention the Supreme Court's decision to grant certiorari in Good News Club v. Milford Central School.[26] This case, however, is materially different. The Milford policy provides that "School premises shall not be used . . . for religious purposes."[27] There is a powerful argument that such a prohibition against the use of facilities for a religious purpose is facially invalid as inevitably presenting viewpoint discrimination. This sharply contrasts with St. Tammany Parish's prohibition of a religious service. The purpose of the speaker is not the inquiry in St. Tammany Parish. Nor does it present the question of religious instruction. In St. Tammany Parish the request was to "worship the Lord in prayer and music . . .," as we have explained.

The baseline of both the majority and the dissenting opinions in the Second Circuit's decision in Good News Club was that a worship service could properly be excluded. In the limited forum created by St. Tammany Parish, there is no restriction upon religious activity, including teaching from a religious perspective, attending use of the school facility unless it was partisan political activity, for profit activity, or a religious service. To illustrate our point, as we have read the St. Tammany Parish rule, encouraging children to memorize Bible verses with opening and concluding prayer may be a religious activity, it may have a religious purpose, but it would not be prohibited as a religious service. St. Tammany Parish's

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[26]202 F.3d 502 (2d Cir. 2000), *cert. granted* 121 S. Ct. 296.

[27]202 F.3d at 507.

rule against religious service is facially valid, and there is no evidence that its efforts to create a limited public forum or its application of its rules are a pretext for viewpoint-based discrimination. Fairly read in context, the rule draws a clear common sense distinction. That the meaning of a rule prohibiting a religious service can be taxed at its margins is no fatal vice. It is understandable and falls far short of an unlicensed power to censor. The evenhandedness of St. Tammany's regulations of its school facilities belies any contrary suggestion.

V

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. A. P. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

EDITH H. JONES, Circuit Judge, with whom SMITH, BARKSDALE, EMILIO M. GARZA, and DeMOSS, Circuit Judges, dissenting from the denial of rehearing en banc:

This is an equal access case. The question is whether public authorities may exclude "religious services or religious instruction" as after-hour rental uses of school facilities, when they have permitted all other uses consistent with the "welfare

of the public", except partisan political activity[1] and for-profit fund-raising. In upholding this blatant discrimination against religious speech, a panel of our court seriously erred. Campbell v. St. Tammany Parish Sch. Bd., 206 F.3d 482 (5th Cir. 2000). Its opinion conflicts with the Supreme Court's equal access and viewpoint discrimination cases, decisions of five other circuit courts, and previous Fifth Circuit cases. We dissent from the denial of en banc review.

The facts are straightforward. The St. Tammany Parish School Board allows after-hours use of its facilities for civic, social and recreational purposes, subject to the exceptions noted above. Over sixty buildings have been opened to hundreds of community groups.[2] But Sally Campbell and the Christian Coalition were, under this policy, denied permission to use the facilities to discuss educational, family and political

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[1]No issue of partisan political use of the school buildings is before us in this case.

[2]These include the Fellowship of Christian Athletes; Mt. Zion Methodist Church Annual Tea; Wildlife and Fisheries Hunter safety training; Southeastern University Community Education classes; Mary Dee's Dance Studio recital; church black history program; Young Marines meeting; Knights of Columbus meeting; Pride-Rape defense program, etc. The St. Tammany School facilities have been used for a variety of other purposes, such as: Righteous Rumble Youth Conference; Brugier Homeowner's Association Candidate Forum; Northshore DARE Association meeting; Willow Wood Homeowner's Association meeting; Folsom Native Plant Society meeting; Northwest St. Tammany Civic Association meeting; Primary Colors Pre-school Christmas program; Relay for Life Cancer fundraiser; Pearl River Volunteer Fire Department banquet; First Church of God banquet; Drainage Board meeting; Gold Wing Riders benefit; Boy and Girl Scouts meetings; Young Blood International seminar; wedding reception; EPA meeting; Kiwanis Club breakfast; Sister-to-Sister conference; and Commission on Families fair.

issues, to pray about those issues, to teach the Bible with regard to those issues, and to worship God in prayer and music.

As the panel noted, this case turns initially on what type of expressive forum the school board created. When public facilities are available "for indiscriminate use by the general public", a designated public forum exists, and content-based exclusion of speakers must survive strict scrutiny review. Perry Education Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 47, 103 S. Ct. 948, 956, 74 L. Ed. 2d 794 (1983). If, however, because of the narrow scope of its intended use, a forum is non-public, then reasonable, viewpoint-neutral content restrictions may be imposed. *See, e.g.* Perry 460 U.S. at 47, 103 S. Ct. 956 (teachers' mailboxes are a nonpublic forum); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993) (excluding religious viewpoint from access to after-hours use of school facilities is unconstitutional).

The panel's first error lies in its allowing St. Tammany's policy to dictate what type of forum exists. The panel observes the Board's written limits on use of school facilities and concludes that, because political and for-profit fundraising activities are prohibited as well as religious instruction or worship, the Board was not solely motivated to discriminate against religious speech. Further, the district policy restricts "more types of uses" than a policy that the Second Circuit held did not create a public forum. Bronx Household of Faith v. Community Sch. Dist. No. 10., 127 F.3d 207, 210 (2nd Cir. 1997). Implicitly, the panel holds that the panoply of what the

school district permits is less important to the forum determination than the speech it excludes.[3]

With due respect, the panel is looking through the wrong end of the telescope. Such a narrow view of the conditions under which a designated public forum can arise is incorrect. "The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." Widmar v. Vincent, 454 U.S. 263, 267-68, 102 S. Ct. 269, 273, 70 L. Ed. 2d 440 (1981) (emphasis added). *See also* Perry, 460 U.S. at 45, 103 S. Ct. at 955. All that is required is that the forum be "generally open" to the public: "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." Police Department of Chicago v. Mosley, 408 U.S. 92, 96, 92 S. Ct. 2286, 2290, 33 L. Ed. 2d 212 (1972) (emphasis added). *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267, 108 S. Ct. 562, 568, 98 L. Ed. 2d 592 (1988) (public facilities opened for indiscriminate use by the general public "or by some segment of the public" are designated public fora).

Also pertinent for present purposes, the Supreme Court has strongly suggested that a designated public forum is created when a school district, which purports to prohibit after-hours "religious uses" of public facilities, nevertheless allows access by a wide variety of private organizations, including some that

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[3]For reasons that are not clear, the panel in its lengthy order on panel rehearing, no longer perceives this as a "minimally sufficient" case to maintain the school buildings' status as a non-public forum. *See* Campbell, 206 F.3d at 487.

may have carried out religious purposes. *See* Lamb's Chapel, 508 U.S. at 391, 113 S. Ct. at 2146 (1993);[4] *see also* Bronx Household, 127 F.3d 207, 218 (2nd Cir. 1997) (Cabranes, J., concurring and dissenting) (noting that Bronx Household is bound to non-public forum description of school district policy by circuit precedent, notwithstanding "anvil-like hint" in Lamb's Chapel).

Contrary to the panel decision, most circuit courts have recognized that the government "create[s] a public forum by allowing diverse groups to use its auditorium." Concerned Women for America, Inc. v. Lafayette County, 883 F.2d 32, 34 (5th Cir. 1989). That a public school rather than a university or library or ballpark is the facility in question makes no difference. *See* Grace Bible Fellowship 941 F.2d 45 (1st Cir. 1991) (Breyer, J., on the panel); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366 (3rd Cir. 1990). It is what the school district "does, not what it says" that determines the type of forum. Gregoire, 907 F.2d at 1374 (citing Board of Education v. Mergens, 496 U.S. 226, 244, 110 S. Ct. 2356, 2369, 110 L.

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[4]"The Church argued below that because under Rule 10 of the rules issued by the District, school property could be used for 'social, civic, and recreational' purposes, the District had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks. Hence, its view was that subject matter or speaker exclusions on District property were required to be justified by a compelling state interest and to be narrowly drawn to achieve that end. . . . The argument has considerable force, for the District's property is heavily used by a wide variety of public organizations, including some that presented a "close question," which the Court of Appeals resolved in the District's favor, as to whether the District had in fact already opened its property for religious uses." Lamb's Chapel, *id.* at 2146 (footnote omitted) (emphasis added).

Ed. 2d 191 (1990)). Were it otherwise, a public body could unilaterally narrow a designated public forum so as to exclude disfavored groups, cynically circumventing the Supreme Court's public forum jurisprudence. This court and others have thwarted such obvious machinations. Gregoire, 907 F.2d at 1378; Hays County Guardian v. Supple, 969 F.2d 111, 117-18 (5th Cir. 1992).

Since the broad "welfare of the community" standard and the actual use of the facilities, rather than the district's exclusion of three categories of speech, determine the type of forum, it should have been plain that the St. Tammany policy created a limited public forum. *See, e.g.*, Grace Bible Fellowship, 941 F.2d at 47; Gregoire, 907 F.2d at 1374, 1375. Cases in which non-public fora were found, by contrast, were those in which the forum is not dedicated to general debate or the free exchange of ideas, or the nature of the property is "inconsistent with expressive activity." Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 803, 105 S. Ct. 3439, 3449, 87 L. Ed. 2d 567 (1985).[5] Neither of those descriptions accords with St. Tammany's policy or practice.

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[5]The various cases finding that a non-public forum existed are clearly distinguishable from the present factual situation. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974) (limited access to advertising space on buses); Greer v. Spock, 424 U.S. 828, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976) (military base is a non-public forum); Adderley v. Florida, 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966) (jailhouse grounds not public forum); Cornelius, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) (federal workplace exists to accomplish the business of the employer and is thus not open to all charitable organizations). *See also* Perry, 460 U.S. at 47, 103 S. Ct. at 956.

Under the proper test, the district facilities were open "indifferently"[6] for use by private groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple. Grace Bible Fellowship, 941 F.2d at 47. As the Supreme Court explains,

> If a state refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."

Board of Education of Westside Community Schools Mergens, 496 U.S. 226, 248, 110 S. Ct. 2356, 2371, 110 L. Ed. 2d 191 (1990) (citing McDaniel v. Paty, 435 U.S. 618, 641, 98 S. Ct. 1322, 1335, 55 L. Ed. 2d 593 (1978) (Brennan, J., concurring in judgment)) (emphasis added).[7]

The panel's second error was to construe the board's policy, if it legitimately created a non-public forum, as maintaining both a reasonable and viewpoint-neutral content restriction against religious worship and instruction. In a

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[6]Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd., 578 F.2d 1122 (5th Cir. 1978).

[7]*See also* Widmar, 454 U.S. at 269, 102 S. Ct. at 274 (if the government creates a "generally open forum," it cannot discriminate against groups "engag[ing] in religious worship and discussion [since] [t]hese are forms of speech and association protected by the First Amendment"). So much for the panel's attempted distinction between religious meetings and "religious instruction and worship."

nonpublic forum, "content discrimination may be permissible if it preserves the purposes of that limited forum, [but] viewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum's limitations." Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 829-30, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995).

The panel opinion says nothing about the policy's reasonableness, which must be judged in light of the forum's general "welfare of the public" standard. The omission is particularly curious given the Supreme Court's criticism in Lamb's Chapel that the lower court there had failed to examine the reasonableness of a restriction against using school buildings after-hours for "religious purposes." One would suppose that without a finding of its reasonableness vis a vis the scope of the forum, a content restriction is doomed. Lamb's Chapel, 508 U.S. at 393 n. 6, 113 S. Ct. at 2147 n. 6.

The policy is, in any event, unreasonable. Perhaps it was motivated by fear that public schools would become the font of off-hours sectarian activity, but there is no record evidence of this. If, on the other hand, the fears relate to excessive use of the facilities, the district could review its custodial regulations to assure that all off-hours costs were recovered. But there is no evidence of these fears, either. *Compare* Fairfax Cov. Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir. 1994). Finally, no legitimate Establishment Clause violation

occurs from allowing religious groups equal access to after-hours rentals.[8]

The crux of the issue is this: when measured against the "welfare of the public standard," how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination? Even the Second Circuit understood that religious worship services are "the ultimate in speech from a religious viewpoint," Bronx Household, 127 F.3d at 215. To describe the exclusion as covering "religious activity" somehow outside the pale of the community's welfare makes no sense. Such a distinction not only invites active censorship by the St. Tammany School Board - e.g., does a prayer or Christian exhortation at the Fellowship of Christian Athletes meeting make it a religious worship service?[9] - but it flatly discriminates against those who practice, rather than simply profess or talk about, religion. Both of these effects have been condemned by the Supreme Court's equal access jurisprudence.

Most recently, the Court ruled that when a university funds student publications generally, and does not exclude religion as

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[8]"It does not violate the Establishment Clause for a public [school] to grant access to its facilities on a religion-neutral basis to a wide spectrum of ... groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercise." Rosenberger, 515 U.S. at 842, 115 S. Ct. at 2523. Since the facilities are used after-hours, there is no threat of a captive audience; since the facilities are used by a variety of groups, there is no threat of the schools endorsing religion: "[B]y creating a forum the [school] does not thereby endorse or promote any of the particular ideas aired there." Widmar, 454 U.S. at 271 n.10, 102 S. Ct. at 275 n.10.

[9]*See* n.2 *supra*.

a subject matter, it is unconstitutional for the school to discriminate based on some speaker's religious viewpoint. Rosenberger, *supra*. Allowing the Fellowship of Christian Athletes, the Knights of Columbus and other religious groups to use the St. Tammany facilities demonstrates, along with the board's broad written access policy, that religious subject matter is not excluded from after-hours rentals. Rosenberger made plain that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and even-handed policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." Rosenberger, 515 U.S. at 839, 115 S. Ct. at 2521; *see also* 515 U.S. at 846, 115 S. Ct. at 2525 (O'Connor, J., concurring) (emphasizing that exclusion of religious groups would evince hostility to religion). Rosenberger condemned the imposition of viewpoint distinctions by the university that would inevitably lead to "governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy." 515 U.S. at 844, 115 S. Ct. at 2524. So it is in this case. Rosenberger then repeated the description of this danger from one of the Court's first equal access cases:

> [T]he dissent fails to establish that the distinction [between 'religious' speech and speech 'about' religion] has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principals" cease to be "singing, teaching, and reading" -- all apparently forms of "speech," despite their religious subject matter -- and become unprotected worship." . . . [E]ven if the distinction drew an arguably principled line, it is highly doubtful it would lie within the judicial

> competence to administer. Merely to draw the distinction would require the university -- and ultimately the courts -- to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Rosenberger, 515 U.S. at 845, 115 S. Ct. at 2524 (citing Widmar, 454 U.S. at 269-70, n.6, 102 S. Ct. at 274, n.6) (citations omitted).[10]

To paraphrase one court, the panel opinion would allow atheists to put on a program denouncing religion or anti-Semites to sponsor a rant against Judaism, but it would not allow religious believers of any stripe to convene or instruct the faithful in this forum. *See* Church on the Rock, 84 F.3d at

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[10]*See also* Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1278 (10th Cir. 1996) (overturning a prohibition against using an otherwise publicly available senior citizens' center for religious worship). The court held that:

> . . . even if the City had not previously opened the Senior Centers to presentations on religious subjects, its policy would still amount to viewpoint discrimination. Any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint. Instruction becomes "sectarian" when it manifests a preference for a set of religious beliefs. Because there is no non-religious sectarian instruction (and indeed the concept is a contradiction in terms), a restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion. Therefore, we conclude that the City's policy constitutes viewpoint determination.

See also Good News/Good Sports Club v. School District of the City of Ladue, 28 F.3d 1501, 1507 (8th Cir. 1994).

1279; *see also* Grace Bible Fellowship, 941 F.2d at 47. This is the very essence of viewpoint discrimination.

It is unfortunate for the citizens of the Fifth Circuit that this court has seen fit to retreat from equal treatment of religious speech and to deviate from fifteen years of consistent Supreme Court jurisprudence on the subject. The St. Tammany school board was not required to open its facilities for the "welfare of the public." Once it did so, however, it could not arbitrarily discriminate against religious speakers. We dissent from the denial of rehearing *en banc*.

APPENDIX E

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Fourteenth Amendment, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

ST. TAMMANY PARISH SCHOOL BOARD
USE OF SCHOOL FACILITIES POLICY

Public school buildings and equipment are built and acquired by the expenditure of public funds for the primary use and benefit of the children of school age in St. Tammany Parish to include the recreation, physical training and athletics of all such children. While, from time to time, the Board may permit the use of some of the public school buildings as a limited public forum, the primary function and use of the buildings is first for the education of children, then community, youth and adult group activities, not the proprietary needs of any particular organization.

Public school buildings may also be used for holding civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community. Such uses shall be non-exclusive and open to the general public.

Additionally, public school buildings and equipment can be used for governmental and non-partisan political functions. Functions such as polling places or open candidate forums, civic forums and community centers for such purposes as evacuation or civil defense shall be allowed as permitted or mandated by law.

No outside organization or group may be allowed to conduct religious services or religious instruction on school premises. However, the use of school facilities by outside organizations or groups outside school hours for the purpose of

discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible if it does not interfere with one of the primary uses of such facilities.

November 13, 1997